SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

THE H COMPANY, LTD.,

Plaintiff,

INDEX No. 1960/09

MOTION DATE: Nov. 25, 2009
Motion Sequence # 007, 008

-against-

MICHAEL KORS STORES, L.L.C., PRK STORES LLC, RICHARD S. KAPLAN, STUART WACHS and FOGEL & WACHS, P.C.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Further Support and Opposition.. X
Reply Affirmation X

This motion, by defendant Michael Kors Stores, LLC ("MKS"), for partial summary judgment pursuant to CPLR 3212 on its cross-claims for breach of contract and fraud in the inducement against defendants PRK Stores, LLC ("PRK") and Richard S. Kaplan, is **granted** in part and **denied** in part; and a cross-motion, by defendants PRK and Richard Kaplan, for denial of MKS' motion and judgment pursuant to CPLR 3212 dismissing MKS' cross-claims against them for breach of contract and fraud in the inducement is **denied**.

The background of this case is set forth in this Court's Order dated July 15, 2009 ,

In that Order this Court, *inter alia*, granted plaintiff ("H Co.") summary judgment against MKS on its cause of action for breach of MKS' obligation to pay H Co. monies due to PRK, but later assigned by PRK to H Co. The record contains a Satisfaction of Judgment, dated August 4, 2009, proving payment by MKS in the sum of $295,368.50.

Now MKS seeks to recoup the amount it paid to H Co. by seeking partial summary judgment on its cross-claims against PRK and Kaplan. The basis of this motion is a Settlement Agreement dated November 5, 2008, between MKS and PRK, which contains the following language:

> 3. Representations and Warranties.
>
> a. PRK hereby represents and warrants to Michael Kors that:
>
> (i) PRK is and at all times has been the holder of the Note, and that the Note has not been and will not be negotiated, assigned or transferred to any person or entity; and
>
> (ii) PRK has not sold, pledged, assigned, transferred, conveyed, or otherwise disposed of any of its claims or any other claims, demands, obligations, or causes of action referred to in this Agreement.

In its third cross-claim MKS alleges that PRK and Kaplan breached the Settlement Agreement because the warranties quoted above are false. Indeed, the Court noted in its prior order that "No explanation whatsoever is provided for the (above quoted) representation in the Settlement Agreement . . . when in fact PRK had assigned a portion of the second installment (of the Note) months earlier to H Co." (Order annexed as Exhibit D, at p. 11)(parentheticals added).

Kaplan is the managing member of PRK who executed the Settlement Agreement. In opposition to MKS' motion, he states that he believed the statement in the Settlement Agreement to be true, and that PRK's former attorney advised him that the statement was true. Kaplan asserts that he had signed many documents at the closing of the litigation of the *Taub* matter in November, 2007, and that the Partial Assignment of Note to H Co. was not in his Index to Closing Documents.

Summary judgment is the procedural equivalent of a trial (***SJ Capelin Associates, Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 341, 1974). The proponent of a motion for summary judgment must make a ***prima facie*** showing of entitlement to judgment as a matter of law (see, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 1986; ***Zuckerman v City of New York***, 49 NY2d 557, 1980). Once the movant makes its ***prima facie*** showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (***Alvarez***; ***Zuckerman***). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations (***Zuckerman***), or conjecture and surmise (***Singer v Neri***, 31 AD3d 738, 740, 2nd Dept., 2006).

An express warranty has been described as:

> "an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue . . .

(***CBS v Ziff-Davis Publishing Co.***, 75 NY2d 496, 503, 1990 citing, ***Metropolitan Coal Co. v Howard***, 155 F2d 780, 784, 2nd Cir., 1946). A claim for breach of warranty is grounded in contract, and the right to indemnification depends on establishing that the warranty was breached [**Id.** at 503-504]. If the promisee has purchased the promise of the existence of the warranted facts, the promisor should not be relieved of responsibility because the promisee may have doubts as to the existence of the warranted facts (**Id.** at 504).

The warranty sued on herein was plainly a bargained-for term in the settlement of the New York County action between PRK and MKS. MKS has met its ***prima facie*** burden of showing breach of that warranty by PRK, by proffering the Settlement Agreement at issue, and establishing the falsity of PRK's warranty therein that the Note had not been assigned. The burden then shifts to PRK and Kaplan.

In opposition, Kaplan's conclusory and self-serving claim that he believed the express warranty to be true is flatly contradicted by documentary evidence, namely, the Partial Assignment of Note Payment Obligation and the Notice of Partial Assignment of Note Payment Obligation, both of which were signed by Kaplan himself. Conclusory and unsupported testimony lacks probative value and is insufficient to raise a triable issue of fact (***Morales v Westchester Stone Co., Inc.***, 63 AD3d 805, 2nd Dept., 2009; ***John Deere Ins. Co. v GBE/Alasia Corp.***, 57 AD3d 620, 2nd Dept., 2008; ***Verela v Citrus Lake Development***

Inc., 53 AD3d 574, 2nd Dept., 2008; ***Alizio v Perpignano***, 39 AD3d 781, 2nd Dept., 2007), especially where such testimony is contradicted by documentary evidence in the record (***Canarick v Cicarelli***, 46 AD3d 587, 2nd Dept., 2007; see, generally, ***Colucci v AFC Construction***, 54 AD3d 798, 2nd Dept., 2008). Based on the foregoing, PRK has failed to raise a triable issue of fact, and consequently, MKS is entitled to summary judgment on its cross-claim against PRK for breach of the express warranties in the Settlement Agreement, and PRK's request for summary judgment dismissing this cross-claim is **denied**.

Kaplan objects to a finding of individual liability on the grounds that he executed the Settlement Agreement in his capacity as a member of a limited liability company and that the representations were made between MKS and PRK. A member of a limited liability company cannot be held personally liable on contracts entered into by his company, provided that the member did not purport to bind himself individually under the subject contract (***Panasuk v Viola Park Realty, LLC***, 41 AD3d 804, 2nd Dept., 2007). There is no evidence that Kaplan purported to bind himself individually under the Settlement Agreement.

Nevertheless, individuals may be held personally liable for an LLC's breach of contract, if the individuals took the challenged actions on the LLC's behalf and the breach involved bad-faith representations (***Ledy v Wilson***, 38 AD3d 214, 1st Dept., 2007; see also, ***First Bank of the Americas v Motor Car Funding, Inc.***, 257 AD2d 287, 1st Dept., 1999). Officers of a corporate defendant may be held personally liable for misrepresentations made in a corporate transaction, where they personally participated in such misrepresentations (***Ideal Steel Supply Corp. v Fang***, 1 AD3d 562, 2nd Dept., 2003; ***Towjer, Inc. v Tarran***, 236 AD2d 518, 2nd Dept., 1997).

Kaplan is a sophisticated businessman. His personal participation in the misrepresentations in the Settlement Agreement is clear, as he is the member of PRK who executed the document. In its pleading MKS specifically alleges that PRK and Kaplan acted intentionally and in bad faith when they falsely represented to MKS that no assignment of the Note had been made. MKS further expressly alleges that PRK and Kaplan breached the Settlement Agreement by making the false representation and warranty quoted above. Kaplan's conclusory and self-serving explanation, that he "believed that this statement was completely accurate," again fails to raise a triable issue of fact. Kaplan's reliance on ***Monex Financial Services Ltd v Dynamic Currency Conversion Inc***.,(19 Misc 3d 1113(A) (Sup Ct., Nassau Cty, 2008), affd as modified at 62 AD3d 675 (2nd Dept. 2009)) is misplaced as

the claim there was one for tortious interference with contract.

Under all of the circumstances of this case, the Court is compelled to conclude that on the basis of Kaplan's personal conduct in executing the Settlement Agreement, he should be individually responsible for the misrepresentation therein to MKS. On this record, the Court holds that MKS is entitled to summary judgment on its cross-claim against defendant Kaplan for breach of the express warranties in the Settlement Agreement, and Kaplan's request for summary judgment dismissing this cross-claim is **denied**.

The essential elements of a claim for fraud are a misrepresentation or material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party, and injury (***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 421,1996). PRK and Kaplan argue that MKS cannot show justifiable reliance on the misrepresentation in the Settlement Agreement, given that MKS did receive the Notice of Partial Assignment of Note Payment Obligation.

On this record, where defendant Kaplan himself allegedly believed the warranties in the Settlement Agreement were accurate, suffice it to say that a triable issue of fact is presented as to whether MKS' reliance on the warranties in the Settlement Agreement was justifiable (***Talansky v Schulman***, 2 AD3d 355, 1st Dept., 2003; ***Country World, Inc. v Imperial Frozen Foods Company, Inc.***, 186 AD2d 781, 2nd Dept., 1992; see, generally, ***Brunetti v Musallam***, 11 AD3d 280, 1st Dept., 2004). For this reason MKS' request for summary judgment against PRK and Kaplan on its cross-claim for fraud, and PRK and Kaplan's request for summary judgment dismissing this cross-claim, must both be denied.

For the record, members of limited liability companies may be held personally liable if they participate in the commission of a tort in furtherance of company business (see, generally, ***Kew Gardens Hills Apartment Owners, Inc. v Horing Welikson & Rosen***, *PC*, 35 AD3d 383, 2nd Dept., 2006; cf. ***Rothstein v Equity Ventures, LLC***, 299 AD2d 472, 2nd Dept., 2002). For this reason also, dismissal of the fraud claim against Kaplan, individually, is **denied**.

Dated JAN 07 2010

J.S.C.

ENTERED

JAN 13 2010

NASSAU COUNTY

COUNTY CLERK'S OFFICE